STATE OF MICHIGAN

COURT OF APPEALS

REGINALD BEASLEY,

Plaintiff-Appellant/Cross-Appellee,

v

DETROIT EDISON COMPANY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
June 24, 2003

No. 233361
Wayne Circuit Court
LC No. 98-832848-CL

Before: Hoekstra, P.J., and Bandstra and Saad, JJ.

PER CURIAM.

In this race and age discrimination case, plaintiff, Reginald Beasley, appeals several orders that culminated in a final judgment entered on November 22, 2000, and defendant, Detroit Edison Company, cross-appeals. We vacate the jury verdict and remand for a new trial on those claims not barred by the statute of limitations.

I. Facts and Procedural History

Plaintiff, a fifty-seven year old African-American, began working for defendant on December 27, 1965. Aside from a two-year leave for military service, plaintiff continued to work for defendant up to and during this litigation. Plaintiff filed his complaint in this case in 1998, and the parties stipulated to a statute of limitations "filing" date of February 1998. Plaintiff alleged that, at several points during his years of employment, defendant discriminated against him on the basis of his race and age. Plaintiff also asserted claims of retaliation and intentional infliction of emotional distress.[1]

Thereafter, the trial court granted in part and denied in part defendant's motion for summary disposition, and held that any alleged acts of discrimination that occurred before January 1, 1990, are time-barred. Regarding plaintiff's claims after January 1, 1990, however, the trial court ruled that plaintiff raised a genuine issue of material fact that there was a

[1] The trial court dismissed plaintiff's intentional infliction of emotional distress claim because plaintiff did not present evidence of extreme or outrageous conduct. Plaintiff does not challenge this ruling on appeal.

continuing policy or pattern of discrimination and at least one discriminatory act occurred within the three-year statute of limitations period.

A jury trial commenced on November 6, 2000, and plaintiff presented evidence regarding alleged discriminatory conduct between 1990 and 1998. Following a five-day trial, the jury found in favor of plaintiff on his race discrimination claim and awarded him $96,000 in damages. The jury returned a verdict of no cause of action on plaintiff's age discrimination and retaliation claims and, thereafter, the trial court denied plaintiff's motion for judgment notwithstanding the verdict on those allegations. The trial court also awarded plaintiff attorney fees and costs and ordered defendant to promote plaintiff to a higher salary position, with a commensurate salary increase.

II. Analysis

A. Summary of Holding

On appeal, plaintiff contends that the trial court erred by dismissing his pre-1990 discrimination claims because he established a continuing policy or practice of discrimination throughout his years of employment. In contrast, defendant argues that the trial court erred by failing to dismiss all claims of discrimination that arose prior to the three-year statute of limitations cut-off date of February 1995. We agree with defendant that the trial court should have summarily dismissed all of plaintiff's pre-February 1995 claims and, therefore, we reverse the trial court's denial of summary disposition on this issue, vacate the jury verdict, and remand for a new trial on plaintiff's timely discrimination claims.

B. Standard of Review and Applicable Law

Defendant brought its motion for summary disposition under MCR 2.116(C)(10) but argued that plaintiff's claims are barred by the three-year statute of limitations set forth in MCL 600.5805(9). This claim should have been brought and considered under MCR 2.116(C)(7), which permits dismissal by motion if "[t]he claim is barred because of . . . statute of limitations . . . ."[2] "This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).[3]

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[2] It is well-settled that "where a party brings a summary disposition motion under the wrong subrule, the trial court may proceed under the appropriate subrule as long as neither party is misled." *Blair v Checker Cab Co*, 219 Mich App 667, 670-671; 558 NW2d 439 (1997). Further, "an order granting summary disposition under the wrong subrule may be reviewed under the correct rule." *Stoudemire v Stoudemire*, 248 Mich App 325, 332 n 2; 639 NW2d 274 (2002).

[3] As our Supreme Court also explained in *Maiden*:

> A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. . . . Unlike a

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Under the Michigan Civil Rights Act (CRA), it is well-settled that "[a] plaintiff who alleges employment discrimination . . . must file her claim within three years of the time that it accrued." *Womack Scott v Department of Corrections*, 246 Mich App 70, 74; 630 NW2d 650 (2001); see also MCL 600.5805(9). However, in *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986), our Supreme Court "recognized an exception to the statute of limitations for continuing violations." *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 343-344; 483 NW2d 407 (1992). In *Sumner*, the Supreme Court characterized the problem of imposing time limits on filing employment discrimination claims as, among other things, that:

> [M]any discriminatory acts occur in such a manner that it is difficult to precisely define when they took place. One might say that they unfold rather than occur. [*Sumner, supra* at 526.]

Accordingly, after reviewing the historical development of the "continuing violation" exception in employment discrimination cases, the *Sumner* Court concluded that the exception applies to (1) claims based on a continuing *policy* of discrimination and (2) when "an employee challenges a series of allegedly discriminatory acts so sufficiently related as to constitute a pattern where only one of the acts occurred within the limitation period." *Meek, supra* at 344, citing *Sumner, supra* at 528. Here, plaintiff asserted claims under both theories to recover for alleged incidents of discrimination arising between 1970's and the date of trial.

C. Continuing Policy of Discrimination

Plaintiff failed to establish the existence of a discriminatory policy at Detroit Edison that prevented him from securing promotions or salary increases.

As set forth in *Sumner, supra* at 534, quoting *Acha v Beame*, 570 F2d 57, 65 (CA 2, 1978) (emphasis deleted), "[a] continuously maintained illegal employment policy may be the subject of a valid complaint until a specified number of days after the last occurrence of an instance of that policy." As the *Sumner* Court further explained:

> While we agree . . . that mere continuation of employment does not extend the life of a cause of action, the continued existence of a discriminatory policy does provide the basis for a continuing violation. We find that under the Handicappers' Civil Rights Act, an action is timely so long as it is filed within three years after the cessation of a deprivation proximately caused by such a policy and there is an application of that policy within the period of limitation. [*Sumner, supra* at 536.]

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motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994).

In his response to defendant's motion for summary disposition, plaintiff asserted that defendant maintains an "unwritten" policy of denying black employees promotions and salary upgrades. Plaintiff compares his case to the cited examples of actionable, continuing policies of discrimination in *Sumner, supra*. Specifically, the *Sumner* Court discussed *United Air Lines v Evans*, 431 US 553; 97 S Ct 1885; 52 L Ed 2d 571 (1977), in which the company's employment policy required female flight attendants to resign when they married, but did not require male flight attendants to resign under the same circumstances. See *Sumner, supra* at 527 and 534. The *Sumner* Court also considered the companion case, *Robson v General Motors*, in which Robson claimed he was demoted from his position as a test driver because company doctors, applying the company's policy of medical criteria for test drivers, concluded that he did "not meet the minimum requirements for classification as [a] driver" because he suffered from curvature of the spine. *Sumner, supra* at 511.

Plaintiff also relied on *Reed v Lockheed Aircraft Corp*, 613 F2d 757 (CA 9, 1980), in which Reed alleged sex discrimination because, in her twenty-five years at the company, she was never promoted under a Lockheed policy in which "the company approached worthy candidates to ask them if they wished promotion." *Id*. at 759. In considering the timeliness of Reed's claim, the Ninth Circuit Court of Appeals explained that, "the critical question is whether Lockheed, within 300 days of Reed's filing her charge, engaged in the unlawful conduct of failing to promote women in situations where men would be promoted." *Id*. at 760. In other words, similar to *Clark v Olinkraft, Inc*, 556 F2d 1219 (CA 5, 1977), Reed alleged a continuing violation based on "the entire promotion system . . . [which] continually operated so as to hold [her] in lower echelons." *Reed, supra* at 760, quoting *Clark, supra* at 1222, quoting *Rich v Martin Marietta Corp*, 522 F2d 333, 348 (CA 10, 1975). In such cases, a "challenge to systematic discrimination is always timely if brought by a present employee, for the existence of the system deters the employee from seeking his full employment rights or threatens to adversely affect him in the future." *Reed, supra* at 761, quoting *Elliott v Sperry Rand Corp*, 79 FRD 580, 586 (D Minn, 1978).

Contrary to plaintiff's assertion in his brief below, this case is not "strikingly similar" to *Reed, supra* or to any of the other cases cited above. First, unlike *Evans* and *Robson*, plaintiff failed to identify a Detroit Edison policy, procedure, or system which systematically and continually discriminated against black employees. Further, unlike *Reed*, plaintiff did not present evidence to describe or to support a finding that defendant's promotional system "continually operated so as to hold [him and other black employees] in lower echelons" of positions at defendant. *Reed, supra* at 760. Again, while plaintiff asserted that he was denied promotions and salary increases "like other black employees," he developed no argument that a policy, written or unwritten, served to methodically deny promotions or pay raises to black employees at defendant. Rather, plaintiff simply asserted, without support, that a discriminatory policy existed at defendant because, on certain occasions during his thirty-five years at the company, he was denied requested promotions or pay increases. Such evidence does not prove the existence of a company policy, let alone a policy targeted at or affecting black employees as plaintiff alleged.

Accordingly, plaintiff's "continuing policy" argument fails and this theory does not except plaintiff's claim from the three-year statute of limitations.

D. Continuing Pattern of Discrimination

In response to defendant's motion for summary disposition, plaintiff also argued that, as in *Sumner*, he was subjected to a series of related discriminatory acts, the last of which fell within the three-year statute of limitations period.

To determine whether "a continuing course of discriminatory conduct" occurred to except a claim from the three-year statute of limitations, the *Sumner* Court, at 344, explained that the trial court must consider specific factors:

> The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? [Quoting *Berry v LSU Bd of Supervisors*, 715 F2d 971, 981 (CA 5, 1983).]

In *Sumner*, an African-American employee, Sumner, alleged that his supervisor "repeatedly verbally abused him" and called him "racially derogatory names." *Id*. at 513. The supervisor also "stood over [Sumner] for long periods of time while he was working" and prevented Sumner "from obtaining medical assistance when injured at work." *Id*. When Sumner received a promotion, his new supervisor joined in continually harassing Sumner on the basis of his race. *Id*. at 514. Sumner ultimately initiated a physical altercation with the two supervisors and was terminated. *Id*. at 514-515. Our Supreme Court concluded that the supervisors' actions "fit precisely within" the factors set forth above because all of the discriminatory acts involved racial harassment, the discriminatory acts recurred frequently, and the harassment did not manifest itself in permanent employment decisions that would trigger Sumner's duty to assert his rights. *Sumner, supra* at 538-539. The Court remanded the case for further factual findings regarding whether Sumner's dismissal constituted a timely discriminatory act connected to the ongoing harassment. *Id*. at 539-542.

Similarly, in *Meek*, over several years, the plaintiff's supervisors made repeated discriminatory comments about her gender and religion, and she filed a complaint under the CRA after she was terminated. *Meek, supra* at 342-343. The defendant, Michigan Bell, argued that allegations of discrimination prior to the three-year statutory cut-off were untimely, but this Court disagreed:

> In the present case, we hold that the prior actions of the employees of defendant Michigan Bell constituted a continuing violation sufficient to avoid the statutory limitation period. All the discriminatory events alleged by plaintiff involved the same subject matter: gender and religion. Also, the derogatory remarks made to plaintiff were not isolated to work assignments or employment decisions, but, rather, were recurring with nearly every new supervisor she was employed under. It was these same supervisors who denied plaintiff merit raises and favorable evaluations. Lastly, their acts did not have such a degree of permanence that plaintiff should have asserted her rights earlier. Over

> approximately nine years, plaintiff had several supervisors. It was reasonable for plaintiff to believe that with each transfer and change in supervision the discriminatory conduct would cease. However, with almost each new supervisor came a new wave of harassment. We believe that the acts of defendant Michigan Bell's employees exhibited a continuous course of discriminatory conduct sufficient to invoke the continuing-violations exception to the statutory limitation period. [*Id*. at 344-345.]

This Court also found that the plaintiff established a connection between the timely and untimely claims so that the untimely claims were not barred by the statute of limitations. *Id*. at 345.

Here, as of the date of the motion for summary disposition, plaintiff's allegations of discriminatory conduct which predated the filing of his complaint by more than three years included: (1) defendant's failure to cross-train plaintiff in 1979 and 1980; (2) defendant's failure to ask plaintiff to join the Management Awareness Program for minority employees in 1994; (3) defendant's failure to increase plaintiff's salary until two years after plaintiff received his engineering degree in 1978; (4) defendant's grant of a salary increase to two engineers in 1980, after plaintiff moved to the cartography department; (5) plaintiff's removal from the position of temporary Lead Hoist Engineer to Engineer and his reduction from M5 to M2 salary in 1989 or 1990; (6) defendant's salary upgrade to M4 for four engineers in October 1994, while plaintiff remained at M2; and (7) defendant's choice of other candidates for certain positions in the early 1990s.

Plaintiff's continuing violation claim fails for several reasons. First, in contrast to the ongoing harassment in *Sumner* and *Meek*, here, plaintiff's claims clearly involve isolated employment decisions that were made at very diverse points in plaintiff's career, while he worked in different positions, in different departments and under different supervisors. Indeed, in his brief below, plaintiff concedes that the allegedly discriminatory acts "were relatively infrequent." Further, plaintiff failed to establish the events were linked by a consistent discriminatory subject matter. While he *alleges* that each employment decision was motivated by his race or age, plaintiff did not present any evidence to show that his race or age was a recurring factor in the employment decisions or that there was any discriminatory motive behind each decision. Rather, plaintiff's allegations, in each instance, are based on an *inference* of some discriminatory motive, based on distinct circumstances of each decision such as different positions, applicants, qualifications, and decision-makers.

Indeed, the *only* apparent connection between plaintiff's allegations appears to be that they occurred at various points during his thirty-five years of employment at Detroit Edison. Again, "mere continuation of employment does not extend the life of a cause of action . . . ." *Sumner*, *supra* at 536. Again, unlike *Sumner* and *Meek*, in which the plaintiffs suffered a sustained stream of racially and sexually discriminatory remarks for months before a final discriminatory act, plaintiff's allegations concern distinct instances when he was denied a promotion or pay raise which, only in hindsight, does he assert may have been discriminatory. The claims, therefore, are "more in the nature of an isolated work assignment or employment decision" rather than a discernable pattern of discriminatory conduct. *Sumner, supra* at 344.

Moreover, in contrast to a series of discriminatory remarks or acts which ultimately led to job loss in *Sumner* and *Meek*, here, the discriminatory acts - failure to promote or increase salary

- have a degree of permanence. In each, unrelated instance plaintiff did not receive a specific promotion, pay raise, or employment benefit. Plaintiff emphasizes his ignorance of the discriminatory nature of the employment decisions as a justification for his failure to assert his rights. However, plaintiff's analysis is logically unsound: as the *Sumner* test clarifies, a claim is not a continuing violation *because* a plaintiff fails to assert his rights in the face of discriminatory conduct; rather, a plaintiff cannot be *expected* to assert his rights if, by nature, the discriminatory acts are consistent, frequent and temporary until a timely, actionable event occurs. A plaintiff cannot sit on his rights and later claim lack of knowledge where, as here, the alleged acts of discrimination were diverse, sporadic and permanent.

Finally, as defendant correctly argues, plaintiff not only had to show a continuing pattern of discrimination since before the statutory cut-off date, he had to establish that a discriminatory act occurred *after* the cut-off date which was part of that continuing pattern. Plaintiff raised two specific claims of discrimination occurring after February 1995: (1) the promotion of Carol Glick and (2) the promotion of Blake Licht. Plaintiff failed to support or even explain how these incidents were part of a continuing pattern of discrimination and no evidence suggests that these isolated employment decisions were the culmination of a continuing chain of discriminatory acts. As our Supreme Court established in *Sumner, supra* at 539, "the mere existence of some vague or undefined relationship between the timely and untimely acts is an insufficient basis upon which to find a continuing violation." In sum, plaintiff failed to establish a factual or logical thread connecting the sporadic employment decisions to show they were sufficiently related so as to demonstrate a pattern of discrimination.

Because plaintiff's claims of discrimination do not fall under the continuing violation doctrine, plaintiffs claims prior to February 1995 are barred by the three-year statute of limitations. *Womack, supra* at 74; MCL 600.5805(9). Accordingly, the trial court erred by ordering that plaintiff may raise claims arising at any time after January 1, 1990 and we hereby reverse that decision.[4] The bulk of plaintiff's claims at trial concerned allegations of discrimination occurring between 1990 and late 1994, all of which are clearly barred by the statute of limitations. Indeed, plaintiff's damage expert calculated all of his damages based on an alleged demotion in 1990 and plaintiff argued repeatedly that he was wrongly denied a pay increase in October 1994. However, plaintiff's complaint and response to defendant's motion for summary disposition assert claims that clearly fall within the three-year statute of limitations cut-off date. Therefore, we must vacate the verdict and award and remand for a new trial on plaintiff's timely claims only.[5] Because we remand for a new trial, we also vacate the damages

[4] We reject plaintiff's claim that defendant is estopped from asserting error because defense counsel "suggested" the cut-off date of January 1, 1990. Defense counsel's query about the cut-off date did not amount to a *suggestion*; rather, defense counsel requested clarification of the trial court's ruling and the trial court confirmed that the cut-off date was January 1, 1990.

[5] Because we must vacate the jury's decision, we need not decide the parties' arguments regarding evidentiary decisions at trial, defendant's motion for directed verdict, defendant's special verdict form, the remarks by counsel during trial, and the decisions on post-trial motions.

portions of the verdict and judgment, and the award of costs and attorney fees. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Henry William Saad